In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 959

DAVID RAY CROWLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 5-13) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 1968. The petition for a writ of certiorari was not filed until January 20, 1969, and is

therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a local Selective Service board lacks the power to issue a valid order to report for civilian work unless, after receiving the National Director's authorization of the particular employment proposed, the board reconvenes prior to the issuance of the order, even though the local board has, at a prior meeting, concluded that the work is suitable for the registrant and decided to offer him that position, subject to the National Director's authorization.

2. Whether the order to report for civilian work in this case was void, because it was signed by the clerk of the board in the absence of an entry in board's minutes formally authorizing her to do so.

STATEMENT

Indicted in the United States District Court for the Eastern District of Virginia for failure to obey an order to report for civilian work, in violation of 50 U.S.C. 456(j) and 462(a), petitioner waived jury trial, and was tried and convicted by the court. On March 15, 1968, he was sentenced to four and one-half years' imprisonment. The court of appeals affirmed (Pet. App. 5-13).

Petitioner, a Jehovah's Witness, timely registered with his local Selective Service board and sought clas-

sification as a conscientious objector (II R. 5-6).[1] Since petitioner was still in high school, however, he was initially classified I-S-H. Following graduation, petitioner received, on October 5, 1966, a notice that he had been classified I-O (II R. 6-7). Classifying petitioner as a conscientious objector implicitly rejected his intervening application for a ministerial exemption (IV-D); this determination was apparently based on the conclusion that "pioneering" for the Witnesses did not fall within the statutory exemption envisioned by Congress (II R. 7). Petitioner took no appeal from his classification (II R. 8).

After petitioner was found physically acceptable, the local board began processing him for civilian duties (II R. 9-10). Petitioner refused to cooperate with the local board in its attempt to locate suitable work for him by declining to fill out SS Form 153 which permits the registrant to indicate his preferred area of employment (II R. 10; see also 1-25, 1-26). After petitioner was granted additional time in which to search for suitable employment consonant with the national interest, the local board, on March 22, 1967, listed three jobs from which petitioner could choose his employment (II R. 11). On March 28, petitioner sent a letter to the board refusing any of the tendered positions (II R. 16). Pursuant to the provisions of 32 C.F.R. 1660.20(c), petitioner, a representative of the State Director of the Selective Service, the local board

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[1] "R" preceded by the volume number denotes the three volume record in the court below. "1", followed by the pertinent numeral, designates a portion of the government's Exhibit One—petitioner's Selective Service file. Copies of the above have been lodged with the Clerk of this Court.

members, and the clerk of the board met, on April 21, 1967, in an attempt to reach some mutually agreeable form of employment. According to a memorandum of that meeting (See 1-11; see, also, II R. 16):

> No agreement was reached with the registrant as to a type of civilian work which he would perform in lieu of induction.
>
> Registrant stated that he would not accept any job offered, because it would "interfere with God's Law" and would be "compromising with the government". Registrant was also informed by Mrs. Powell of what could happen if he refused to accept civilian work.
>
> The local board decided that registrant should be offered employment with the Virginia Department of Highways, Ashland, Va., doing highway work.

After encountering petitioner's repeated refusals, and having concluded that suitable work was available for petitioner with the Virginia Highways Department, the local board sent petitioner's file, together with a request for authorization to order him to report to the Highway Department, to the National Director of the Selective Service (II R. 16). On May 12, 1967, the National Director determined that the job was one in the national interest (1-6). His authorization for the board's decision was received by the local board on May 18 (1-8), and on May 19, the clerk of the board sent petitioner Selective Service Form 153, signed by her (1-5), ordering him to report to the local board on June 5 for instructions on proceeding to his place of employment (II R. 18). Petitioner never appeared at the local board (II R. 22; see, also, 1-3).

ARGUMENT

1. Relying upon *Brede* v. *United States*, 396 F. 2d 155, modified upon petition for rehearing, 400 F. 2d 599 (C.A. 9), petitioner argues that his local board violated 32 C.F.R. 1660.20(d) by failing to reconvene after receiving the authorization from the National Director that the work it had determined to offer petitioner was in the national interest, and that, as a result, the board deprived him of due process of law. Since petitioner's premise that the board failed to abide by Selective Service regulations is erroneous, his due-process claim necessarily falls. The regulation relied on, 32 C.F.R. 1660.20(d), provides in pertinent part:

> If, after the meeting referred to in paragraph (c) of this section, the local board and the registrant are still unable to agree upon a type of civilian work which should be performed by the registrant in lieu of induction, the local board, with the approval of the Director of Selective Service, shall order the registrant to report for civilian work * * *.

The court below correctly rejected petitioner's interpretation of this paragraph, holding that "[w]hen the Director's approval was given, it was not necessary for the board to hold another meeting with respect to" ordering petitioner to report for specifically designated work (Pet. App. at 13). The only suggestion to the contrary had appeared in the original opinion in *Brede*, but, as the court below noted (Pet. App. at 10-11), the Ninth Circuit subsequently retracted that

language. On the government's petiton for rehearing, the *Brede* court stated (400 F. 2d at 599):

> The United States contends that § 1660.20(d) does not require that a meeting be held after receipt of authorization; that an order to report could be entered prior to authorization but subject to subsequent authorization and notice.
>
> We agree. In this respect our [original] opinion is modified by striking 'after receiving such authorization.'

This interpretation of the regulation, now shared by both circuits that have focused on it, is correct. Section 1660.20(d) requires only that—in those instances when the board and the registrant are unable to reach agreement on suitable employment—the authorization of the National Director of the Selective Service must be received by the local board *at some point* prior to the mailing of the notice to report for civilian employment. There is no compelling reason, either of policy or in law, why that authorization must be received prior to the board's initial, contingent determination that a certain type of employment would serve the national interest and that the registrant should be offered such employment. The discretion of the board for which a meeting is required is exercised when the board determines that certain work will be offered to the applicant, subject to the Director's approval that the work is in fact in the national interest. If that approval is obtained, a board meeting thereafter, merely to reaffirm what had originally been decided, would serve no useful purpose. And as we have seen, the board, at its meeting on April 21, performed its administrative responsibility and (1-11):

decided that registrant should be offered employment with the Virginia Department of Highways, Ashland, Va., doing highway work.

2. The order to report for civilian work was signed by the clerk of petitioner's local board. Petitioner alleges that, since the minutes of the board do not establish the adoption of a resolution authorizing the clerk to sign and issue official documents, the order of the board was void *ab initio*. The contention is without merit.[2] Irrespective of whether the local board had formally adopted a resolution authorizing the clerk to sign such notices, petitioner can point to no prejudice flowing from such a technical variation from the regulations (see 32 C.F.R. 1604.59). Undeniably, the board had completed its discretionary function; the mailing of the order communicating its decision was merely a ministerial act. As observed in *United States* v. *Hagaman*, 213 F. 2d 86, 91 (C.A. 3), petitioner "has had all the consideration due him, the courts have refused to reverse for mere technical irregularities." In this exact situation, and in similar situations, the various circuits have declined to reverse convictions because the clerk, though not expressly authorized to do so, signed and mailed various notices to registrants. The language of the regulation on which

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[2] The same issue was recently before the Court on writ of certiorari in *Stiles* v. *United States*, No. 74, this Term. (See pp. 29-32 of the government's brief in that case.) On December 9, 1968, the Court dismissed the writ as improvidently granted.

petitioner relies has consistently been held to be directory, not mandatory. The failure to comply therewith, involving as it does a function primarily administrative in nature, does not serve to oust the board of jurisdiction over the registrant or to vitiate its orders to him. See *e.g.*, *United States* v. *Lawson*, 337 F. 2d 800, 812, 813 (C.A. 3), certiorari denied, 380 U.S. 919; *Keene* v. *United States*, 266 F. 2d 378, 380-381 (C.A. 10); *Mason* v. *United States*, 218 F. 2d 375, 377 (C.A. 9); *Talcott* v. *Reid*, 217 F. 2d 360, 364 (C.A. 9); *Kalpakoff* v. *United States*, 217 F. 2d 748, 749-750 (C.A. 9), certiorari denied, 348 U.S. 982; *United States* v. *Fratrick*, 140 F. 2d 5, 6-7 (C.A. 7).

Moreover, as noted in the opinion below (Pet. App. at 8-9), the presumption of regularity of administrative proceedings is defeated only by an affirmative showing of irregularity. Here, no such showing has been made. Pursuant to an order of the court below, the United States Attorney procured affidavits from the clerk and the members of Local Board 115, with respect to whether any resolution empowering the clerk to sign official papers had ever been adopted. The affidavit of the clerk (Pet. App. 4) indicates that such a resolution was passed at a board meeting in 1960, but that, apparently due to an administrative oversight, it was never duly entered in the minutes of the board (III R. 11). Two members of the board, Messrs. George Thorburn and John Orrock, filed affidavits in which they stated that they had "a recollection of a discussion concerning the clerk to sign all official papers and to the best of [their] knowledge this was done" (III R. 10, 12). Another member of the

board at that time, J. W. Kimman, stated in his affidavit that "there was never any question of the Executive Clerk's authority to sign any official papers * * *. The question of formally recording such authority was discussed on several occasions" with the other members of the board (III R. 13). On the basis of these affidavits, it is apparent that the board had granted to the clerk the authority to sign official papers, even though the authority was never formally recorded. In such circumstances, petitioner—who had unequivocally evidenced his intent to refuse any civilian work whatever—was in no manner prejudiced by the board's failure to comply with the literal requirements of Section 1604.59.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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